

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHURON JOHNSON,	§
	§
Defendant Below-	§ No. 410, 2011
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID Nos. 1007008641
Plaintiff Below-	§
Appellee.	§

Submitted: March 6, 2012

Decided: May 1, 2012

Before **STEELE**, Chief Justice, **JACOBS**, and **RIDGELY**, Justices.

ORDER

This 1st day of May 2012, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) The defendant-appellant, Shuron Johnson (Johnson), pled guilty on April 21, 2011 to one count of first degree robbery and one count of second degree robbery. On May 9, 2011, Johnson moved to withdraw his plea. On July 7, 2011, the State moved to declare Johnson to be a habitual offender. On July 29, 2011, the Superior Court denied Johnson's motion to withdraw his plea, granted the State's motion to declare Johnson a habitual offender, and sentenced Johnson to a total period of thirteen years at Level V incarceration to be suspended after serving

eight years in prison for decreasing levels of supervision. This is Johnson's direct appeal.

(2) Johnson's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Johnson's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Johnson's attorney informed him of the provisions of Rule 26(c) and provided Johnson with a copy of the motion to withdraw and the accompanying brief. Johnson also was informed of his right to supplement his attorney's presentation. Johnson filed a fifteen page response for this Court's consideration. The State has responded to Johnson's points, as well as to the position taken by Johnson's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally

devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

(4) In response to his counsel's Rule 26(c) brief, Johnson filed a lengthy document, which essentially claims that his guilty plea was not entered knowingly, intelligently, and voluntarily due to his mental illness and his counsel's ineffectiveness. He argues that the Superior Court, thus, erred in denying his motion to withdraw his plea.

(5) The State, relying on *Johnson v. State*,² argues that this Court should not consider Johnson's present claims in the context of his direct appeal. The State contends that all of Johnson's claims relate to his counsel's alleged ineffectiveness and that such claims are best considered in the context of a postconviction motion filed pursuant to Superior Court Criminal Rule 61.³ Unlike the present case, however, the defendant in *Johnson v. State*, had not filed a motion to withdraw her guilty plea in the Superior Court. The trial judge thus had not had the opportunity to review the bases for the plea withdrawal in the first instance.

(6) In this case, Johnson *did* file a motion to withdraw his plea within two weeks after he entered it. He contends that he was compelled to file the motion *pro se* because his lawyer refused to file it on his behalf. In denying the motion to

¹ *Penon v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

² 962 A.2d 233 (Del. 2008).

³ See *Johnson v. State*, 962 A.2d at 234.

withdraw, the Superior Court held that Johnson had not presented “any fair and just reason” for withdrawing his plea under Superior Court Criminal Rule 32(d).⁴ While ostensibly that ruling denied the merits of Johnson’s ineffective assistance of counsel claims, which were the basis for the motion to withdraw, the Superior Court’s ruling did not include the in-depth cause and prejudice analysis⁵ or utilize the procedures applicable to a postconviction petition filed pursuant to Rule 61. Accordingly, we conclude that Johnson’s appeal should be dismissed without prejudice to his right to raise his ineffectiveness claims in a timely Rule 61 motion. This will allow the Superior Court the opportunity to fully consider Johnson’s claims of ineffective assistance of counsel utilizing the procedures of Rule 61 and applying the legal standards recently enunciated by the United States Supreme Court in *Missouri v. Frye*⁶ and *Lafler v. Cooper*.⁷

NOW, THEREFORE, IT IS ORDERED that the within appeal is hereby DISMISSED without prejudice.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

⁴ Del. Super. Ct. Crim. R. 34(d) provides that, if a motion to withdraw a plea is made prior to sentencing, the Superior Court “may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 61.”

⁵ See *McDonald v. State*, 778 A.2d 1064, 1075 (Del. 2001) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) for the standard of review to be employed in reviewing ineffective assistance of counsel claims in the context of a guilty plea).

⁶ ___ S. Ct. ___, 2012 WL 932020 (2012).

⁷ ___ S. Ct. ___, 2012 WL 932019 (2012).